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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARPREET SINGH,

Petitioner - Appellant,

v.

STEVEN CAMBRA, Director,

Respondent - Appellee.

No. 04-17224

D.C. No. CV-01-03029-SBA

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Submitted April 6, 2006^{**}
San Francisco, California

Before: NOONAN, SILER^{***}, and BYBEE, Circuit Judges.

Petitioner Harpreet Singh appeals the district court's denial of his petition for habeas relief under 28 U.S.C. § 2254. Singh was convicted in California state

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

^{***} The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

court of assault with a deadly weapon, battery, and misdemeanor vandalism. On direct appeal, and in his habeas petition, Singh contended that the trial judge violated his right to due process by instructing the jury that they could consider Singh's prior assault conviction as substantive evidence of his guilt of the charged offenses. The California Court of Appeal found that the challenged instruction violated the California evidence code, but declined to decide whether a due process violation had occurred. Instead, applying the standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967), the California court found that any error that occurred at Singh's trial was "harmless beyond a reasonable doubt." The district court agreed, and denied Singh's habeas petition.

Even assuming, as Singh urges, that the trial court's state-law evidentiary error also constituted a federal due process violation, we agree that Singh is not entitled to habeas relief. Because the California court determined that the instructional error at Singh's trial was harmless, we may grant relief only if we conclude "(1) that the state court's decision was 'contrary to' or an 'unreasonable application of' Supreme Court harmless error precedent, and (2) that [Singh] suffered prejudice under *Brecht* [*v. Abrahamson*, 507 U.S. 619, 637 (1993)] from the constitutional error." *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005).

We find the second prong of this analysis to be decisive here. Under *Brecht*, Singh can prevail only if the trial court’s instructional error had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht*, 507 U.S. at 637. In conducting the *Brecht* analysis, we undertake an “independent evaluation” of the trial record, *Inthavong*, 420 F.3d at 1060-61, and owe “no deference” to the state court’s harmless-error decision, *Id.* at 1059.

We accept, as we must, the California court’s decision that the challenged instruction was an impermissible propensity instruction under California state evidence law. We do not, however, believe that this instruction had a “substantial and injurious” effect on the verdict in Singh’s case. The indictment in Singh’s case, in accordance with California Penal Code § 186.22, alleged that Singh had committed the charged crimes in connection with the activities of a “criminal street gang.” This allegation required the prosecutor to prove that Singh was a member of a gang that had engaged in certain statutorily-specified criminal activity. *See* Cal. Penal Code § 186.22(f) (2006). Singh’s prior assault conviction – a crime in which several other gang members were involved – met the statutory criteria for showing that Singh was involved in a criminal street gang. *See* Cal. Penal Code § 186.22(b)(1), (e) (2006).

The trial record indicates that evidence of Singh's prior conviction was tightly and exclusively linked to its permissible statutory purpose – proving up the gang enhancement – whenever it was mentioned. Testimony regarding Singh's conviction was brief and was explicitly tied to specific statutory elements of the gang enhancement. During closing arguments, defense counsel emphasized that the prior conviction was not evidence that Singh had committed the present crime, and the prosecutor agreed, stating that the jury should use this evidence only when considering the gang enhancement. We find nothing in the conduct of the trial to indicate that the prosecutor ever, through questioning or argument, suggested or implied to the jury that they could use Singh's prior conviction to show that he was guilty of the crimes he was now charged with.

The challenged jury instruction itself also provides support for our conclusion. The trial judge, relying on a California form jury instruction, told the jury that:

Except as you will otherwise be instructed, this evidence [of Singh's prior conviction], if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:

One, that a defendant committed the crimes charged in counts one, two, and three for the benefit of, at the direction of, or in association

with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. . . .

Thus, the challenged instruction itself made explicit reference to the statutory elements of the gang enhancement. Moreover, the instruction reveals that the trial judge explicitly instructed the jury not to consider the prior-crimes evidence “to prove that defendant . . . has a disposition to commit crimes.” Absent any indication to the contrary, we must “assume the jury’s ability to follow limiting instructions,” including the one given here. *United States v. Mayfield*, 189 F.3d 895, 908 (9th Cir. 1999).

Thus, the trial record, considered as a whole, establishes that the evidence of Singh’s prior conviction was consistently linked to a permissible, non-propensity purpose. On this record, we do not believe that the trial judge’s isolated erroneous instruction caused the jury to apply that evidence to an impermissible purpose. The instructional error therefore had no “substantial and injurious effect” on Singh’s verdict, and the denial of his habeas petition is accordingly affirmed.¹

AFFIRMED.

¹ Because we conclude that the *Brecht* standard is not met, we need not address Singh’s contention that the state court’s harmless-error decision was an unreasonable application of *Chapman*. See *Inthavong*, 420 F.3d at 1061.